

**Massachusetts Workers' Compensation
Advisory Council Minutes**

August 8, 2007

Department of Industrial Accidents
600 Washington Street, 7th Floor
Boston, MA 02111

Present: Chairman Edmund C. Corcoran, Jr.; Acting Vice-Chairman Mickey Long.

CM: Jeanne-Marie Boylan; Robert Banks (William Corley); Peter A. Cook (Karen Shanley); Kenneth Paradis (Andrea Keyo); Tom Jones (Department of Labor).

Also Present: DIA: Commissioner Paul V. Buckley; Timothy McMahon, Deputy Commissioner of Administration; William C. Tattan, Deputy Commissioner/General Counsel; Martine Carroll, Senior Judge; William Taupier, Deputy Director of Administration and EDP; Douglas Sears, DIA; John Zimini, DIA; Tim Watterson, Liberty Mutual; Mike Kelley, AIM Mutual Insurance Company; Ellen Keefe, WCRIB; Dan Crowley, WCRIB; Anthony Salido, WCRIB; Glenn Niinimaki, Massachusetts Association of Insurance Agents; Stephen Joyce, New England Carpenters; David Paquette, Iron Workers Union Local #474.

Advisory Council Staff: Andrew Burton; Andrea Maclver.

Absent: CM: John Regan; John Pulgini; Tony Frias; John D. Boyle; Jill Brown; Department of Business and Technology.

Agenda:

Chairman's Welcome

DIA Update

- Judicial Update - Martine Carroll, Senior Judge
- Vital Statistics - William Taupier, Deputy Director of Administration & EDP

Action Items

- Minutes - June 13, 2007

Proposed Audit Guidelines - Sole Proprietors/Partnerships

Executive Director Update

Miscellaneous

CHAIRMAN'S WELCOME

Chairman Edmund C. Corcoran, Jr., began today's meeting at 9:00 a.m. Chairman Corcoran requested that Senior Judge Martine Carroll proceed with the judicial update.

DIA UPDATE

Judicial Update

Senior Judge Martine Carroll updated Advisory Council Members on the information contained within the DIA's vital statistic report for August 2007 (see attached). Conference Queue: 291; Hearing Queue: 1,493; Reviewing Board Inventory: 181; Impartial Exams for FY'08 (to date): 544 (8 waivers). In fiscal year 2007 there were 5,246 Impartial Medical Examinations (202 waivers).

Senior Judge Carroll informed the Advisory Council Members that the average waiting period for a conference is between 4 and 6 weeks. The Senior Judge stated that the Impartial Physician roster currently has approximately 225 doctors enrolled. She noted that on August 1, 2007, all DIA judges began wearing robes. The Senior Judge stated that the robes have been very well received by the judges, public and attorneys.

Chairman Corcoran addressed the issue of courtroom security and asked whether the DIA could provide a private entrance for judges into the courtrooms. Senior Judge Carroll stated that the administration is presently reviewing security concerns of the Judges and is looking to elevate the level of security in all regional offices.

Senior Judge Carroll reviewed with Advisory Council Members the status on vacant judicial positions. The Senior Judge noted that once a Nominating Panel is fully in place, they will begin advertising for the two Administrative Judge vacancies and the one Administrative Law Judge vacancy. Senior Judge Carroll stated that she expects the Advisory Council to begin judicial interviews sometime in October or November.

Council Member Mickey Long expressed concern regarding the 291 cases in the Conference Queue. **Council Member Long asked if it was possible to determine the number of injured employees in the Conference Queue who are not receiving wage-replacement benefits.**

Senior Judge Carroll explained to Advisory Council Members that the Conference Queue is constantly fluctuating and that 291 cases is actually a very low queue. Deputy Director Taupier explained that the DIA's database could be queried to determine who is not receiving benefits in the Conference Queue.

Stop Work Orders/Caseload Statistics

Mr. Taupier updated Advisory Council Members on the Stop Work Order (SWO) and Caseload Statistics for July 2007 (see attached). Total compliance investigations initiated in July 2007: 1,313; total investigations for FY'07: 23,214; total investigations for FY'06: 23,118; total SWOs issued in July 2007: 36; total SWOs issued for FY'07: 388; total number of SWOs issued for FY'06: 228; total fines collected in July 2007: \$37,922; total fines collected in FY'07: \$400,753; total fines collected in FY'06: \$230,465.

Mr. Taupier continued his update of the monthly vital statistics. Total number of cases filed for July 2007: 1,212; total number of cases filed for FY'08 (to date): 1,212; total number of cases filed for FY'07: 15,149; total number of First Report of Injury Forms (FRI) filed for July 2007: 2,524; total number of FRI filed online for July 2007: 735 (29%); total number of FRI filed for FY'08 (to date): 2,524; total number of FRI filed online for FY'08 (to date): 735; total number of FRI filed for FY'07: 33,476; total number of FRI filed online in FY'07: 8,910.

Mr. Taupier stated that he anticipates a significant increase in the number of First Report of Injury Forms filed online once the DIA is capable of receiving batch forms. Mr. Taupier expects batch form submission to be available sometime in the fall.

Mr. Taupier proceeded with his update on uninsured claims (§65). Total number of §65 claims processed for FY'08 (to date): 21; total amount of §65 claims paid by the Trust Fund for FY'08 (to date): \$0; total number of §65 claims filed for FY'07: 193; total amount of §65 claims paid by the Trust Fund for FY'07: \$6,772,994.

Mr. Taupier proceeded with the vital statistics for the Second Injury Fund (§37/37A). Total number of §37/37A petitions approved for payment in FY'08 (to date): 0; total amount paid on these claims in FY'08: \$0; total number of §37/37A petitions filed in FY'08: 0; total amount paid on these claims in FY'07: \$26,575,359; total monies recovered by the Trust Fund in FY'08 (to

date): \$223,620; total monies recovered in FY'07: \$1,167,465; total COLA reimbursements to insurers in FY'08 (to date): \$0; total COLA reimbursements to insurers in FY'07: \$9.1 million.

Chairman Corcoran suggested that the Advisory Council consider inviting Trust Fund legal staff members to an Advisory Council meeting within the next couple of months to discuss the processing of uninsured claims and §37/37A cases.

General Counsel Bill Tattan informed the Advisory Council Members that the DIA had recently lost a decision in the Appeals Court on a Second Injury Fund case. The General Counsel stated that as a result of this decision, the DIA is required to pay interest on all §37 cases. He explained that the longer a §37 case remains unresolved, the more interest will need to be paid. The General Counsel stated that it is in the DIA's best interest to resolve these cases as quickly as possible and avoid the lengthy adjudication process.

General Counsel Tattan reported that most New England states, with the exception of New Hampshire and Massachusetts, have either dismantled their second injury funds or severely restricted them. The General Counsel explained that with the enactment of the Americans with Disabilities Act and other similar Federal and State laws protecting the handicapped, it is the opinion of the General Counsel's Office that the statute governing §37 claims be repealed. The General Counsel informed the Advisory Council Members that recommendations have been made to file new legislation which would end §37 benefits by 2008.

Budget/Personnel Issues

Mr. Taupier reported that as of July 2007, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 254 (220 DIA employees, 34 WCTF employees). The DIA has no contract employees at this time. Twelve (12) temporary employees and five (5) interns are being utilized within the DIA as of this report.

Mr. John Zimini, Director of Investigations, reported to the Advisory Council Members that the agency is presently restructuring the Investigations Unit. Mr. Zimini stated that his investigators are being cross-trained to assist Trust Fund investigators. Mr. Zimini noted that the decision to hire new investigators would be reevaluated at a later date.

Office of Education and Vocational Rehabilitation (OEVR) Update

Mr. Taupier presented the OEVR statistics. Total referrals to OEVR in FY'07 (to date): 2,839; total referrals to OEVR in FY'06: 2,932; total mandatory meetings in FY'07 (to date): 2,282; total

mandatory meetings in FY'06: 2,315; total referrals to insurers in FY'07 (to date): 706; total referrals to insurers in FY'06: 747; total Individual Written Rehabilitation Plans (IWRP) approved in FY'07 (to date): 428; total IWRPs approved in FY'06: 433; total number of Return to Work (RTW) in FY'07 (to date): 176; total number of RTW in FY'06: 202; total number of IWRPs completed with no RTW in FY'07 (to date): 152; total number of IWRPs completed with no RTW in FY'06: 186.

PROPOSED AUDIT GUIDELINES - SOLE PROPRIETORS/PARTNERSHIPS

Council Member Mickey Long introduced Mr. Daniel Crowley, Vice President of Residual Market and Customer Service at the Workers' Compensation Rating and Inspection Bureau.

Mr. Crowley gave a brief overview of the Workers' Compensation Rating & Inspection Bureau. He then proceeded to introduce the members of today's panel: Mickey Long, Massachusetts AFL/CIO; Tim Watterson, Liberty Mutual; Glenn Niinimaki, Massachusetts Association of Insurance Agents; Michael Kelley, AIM Mutual Insurance Company; and Ellen Keefe, Vice President and General Counsel, WCRIB.

Mr. Crowley explained that the panel was here today to introduce the Advisory Council Members to the proposed Certificate of Insurance audit guidelines for sole proprietors and partnerships (see attached slides). Mr. Crowley then introduced Mr. Mike Kelley.

Mr. Kelley remarked that the idea of the guideline process evolved through a joint effort to get as many employees covered under workers' compensation insurance in Massachusetts and to help insurers better understand their exposure when writing and collecting premiums. Mr. Kelley stated that some employers are not paying the proper premium amounts when hiring independent contractors, sole proprietors and partnerships.

Ms. Ellen Keefe, Vice President and General Counsel for WCRIB, stated that the insurer may become liable for the payment of workers' compensation benefits to persons (other than their employees) hired by its policyholder. She stated that the insurer is entitled to collect premium for all persons engaged in work that could expose the insurer to liability. She explained that when an insurer audits an insurance policy, the policyholder must present satisfactory evidence that the subcontractor or independent contractor has a Certificate of Insurance.

Attorney Keefe stated that prior to October of 2000 a sole proprietor could not purchase insurance for themselves because they did not qualify as an employee. She reported that some

purchased " *if any*" policies, paying a minimum premium because they have no employees. The " *if any*" policy acts as a safety net in the event the employer picks up employees.

Attorney Keefe reported that in 2002, sole proprietors and partners could elect to be covered as employees. Attorney Keefe stated that after 2002, the number of " *if any*" policies increased dramatically from 2,169 in 2002 to 7,369 in 2006.

Attorney Keefe stated that on May 1, 2007, the DOI directed insurers to indicate on Certificates of Insurance whether the Sole Proprietor/Partner has elected to "opt-in" to be covered themselves. She noted that the need for Certificates to distinguish whether a sole proprietor is covered by the policy became even more important following the 2004 amendment to the Independent Contractor law.

Attorney Keefe reported that in 2004, the existing law regulating the use of independent contractors changed. She stated that it is presumed that any person performing services for another entity is an employee unless the worker meets the following three requirements: (1) the individual is free from control and direction in connection with performance of service, both under contract for the performance of service and in fact; (2) services are performed outside the usual course of business of employer; and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Attorney Keefe explained as a result of this new law, there is a higher probability that insurers will be responsible to pay claims for Sole Proprietors hired by their policyholders who are alleged to be independent contractors. Attorney Keefe introduced Tim Watterston and explained that he would review the proposed Audit Guidelines with Advisory Council Members.

Mr. Watterston explained that if a policyholder can present evidence that the sole proprietor is an employer or they can meet the three-part independent contractor test, then no additional payroll will need to be picked up. If the policyholder fails to present this satisfactory evidence, then additional premium would need to be reflected on the policyholder's policy.

Mr. Watterston explained that the proposed Audit Guidelines explain the insurers' reasoning for determining that a specific individual is an employee for whom premium will be collected. He stated that since the DIA is the ultimate arbiter of whether someone is an employee for purposes of workers' compensation insurance, the WCRIB is seeking the DIA's approval of the proposed Audit Guidelines. Mr. Watterston offered to make himself available to provide education sessions on these guidelines to the DIA Judges and Hearing Officers. He informed

the Advisory Council Members that the subcommittee would appreciate the Advisory Council's support of these guidelines.

Mr. Michael Kelley explained that the purpose of the audit guidelines is to ensure that all employers and general contractors are audited by the same guidelines, thereby providing a level playing field. Mr. Kelley stated that General Contractors will have to become more aware of who they are hiring under these guidelines.

Mr. Glenn Niinimaki, MA Association of Insurance Agents, discussed the cost impact of the proposed guidelines. He explained that premium calculation is based on the following formula: Manual Rate x Payroll = Manual Premium. Mr. Niinimaki stated that the average payroll for sole proprietors in Massachusetts is \$52,000. He stated that prior to August 1, 2007, the cost of securing coverage for sole proprietors was \$5,250. This amount has been significantly reduced to \$3,763, to encourage more sole proprietors to purchase insurance.

In closing Attorney Keefe stated that the ultimate goal of this discussion was to get the DIA's approval of the proposed guidelines. Attorney Keefe also asked for the Advisory Council's support in encouraging the DIA to work with the WCRIB on accepting these guidelines.

Chairman Corcoran stated that he would encourage the Advisory Council's support for these guidelines at the September Advisory Council meeting.

EXECUTIVE DIRECTOR UPDATE

Executive Director Burton stated that the Joint Committee on Labor and Workforce Development has favorably rated three workers' compensation bills endorsed by the Advisory Council. He stated that the three bills were now before their respective Ways and Means Committees. Mr. Burton said that he will continue to push for the passage of these bills and will keep Advisory Council Members informed on any legislative developments.

Mr. Burton reported that Deloitte Consulting was the only contractor to submit a bid for the proposed scar-based disfigurement study. The bid was for \$25,000, which is on level with the Advisory Council's budget. The Executive Director stated that Deloitte will begin gathering data from the WCRIB and the DIA in the coming months. The data will be used to evaluate the historical claim information and project costs to the system under six different legislative scenarios.

MISCELLANEOUS

Chairman Corcoran noted that a public announcement from Attorney General Martha Coakley had been placed in the Council Member's packets. The public announcement educated teens of the various workplace hazards in Massachusetts. Chairman Corcoran stated that the public announcement provided a positive message that teens will take with them after they graduate and move onto full time jobs.

In closing, Chairman Corcoran explained that he and the Executive Director would be attending the next meeting of the Health Care Services Board (HCSB) to discuss the status of the DIA's Case Management System, Utilization Review, and the Workers' Compensation Medical Fee Schedule.

Chairman Corcoran thanked all parties for attending today's meeting.

The next regular meeting of the Advisory Council is scheduled for Wednesday,

September 12, 2007, at 9:00 AM, at the Division of Industrial Accidents, 600 Washington Street, 7th Floor Conference Room, Boston, MA 02111.